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No. 88-593

In the Supreme Court of the United States

OCTOBER TERM, 1988

CARLOS EFRAIN TRUJILLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

JOHN F. DE PUE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the allegations of the indictment and the instructions were sufficient to support petitioner's conviction and sentencing for an offense different from the one listed in the indictment.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Rose v. *Clark*, 478 U.S. 570 (1986)	7
United States v. *Clark*, 475 F.2d 240 (2d Cir. 1973)	6
United States v. *James*, 555 F.2d 992 (D.C. Cir. 1977)	6
United States v. *Pope*, 561 F.2d 663 (6th Cir. 1977)	6

Statutes and rule:

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6475, (Nov. 18, 1988)	7
Drug Abuse Act of 1986, Pub. L. No. 99-570, Tit. III, § 3161(b), 100 Stat. 3207-94 (21 U.S.C. (Supp. IV) 959(b))	3
Controlled Substances Import and Export Act, Pub. L. No. 99-570, Tit. III, 84 Stat. 1236:	
§ 1009, 21 U.S.C. 959	3
§ 1010(b)(1), 21 U.S.C. 960(b)(1)	3
19 U.S.C. 1590	1
21 U.S.C. 841(a)(1)	4, 5, 6
21 U.S.C. 841(b)	4
21 U.S.C. 959(b)(2)	2, 3, 4, 5, 7
21 U.S.C. 960(a)(3)	7
21 U.S.C. 960(b)	3
21 U.S.C. 963	2
Fed. R. Crim. P. 7(c)(3)	6

Miscellaneous:

Devitt & Blackmar, *Federal Jury Practice and Instructions* (Supp. 1988)	5

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 851 F.2d 111.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1988. A petition for rehearing was denied on August 11, 1988 (Pet. App. 12a). The petition for a writ of certiorari was filed on October 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner was convicted of aviation smuggling, in violation of 19 U.S.C. 1590; possession of narcotics on board an aircraft regis-

tered in the United States with intent to distribute them, in violation of 21 U.S.C. 959(b)(2); and attempted importation of cocaine, in violation of 21 U.S.C. 963. He was sentenced to ten years' imprisonment on the aviation smuggling count; to a consecutive ten-year term and a $25,000 fine on the possession count; and to a concurrent five-year term on the importation count.[1] The court of appeals affirmed (Pet. App. 1a-11a).

1. At trial, the government showed that on the evening of May 31, 1987, a Customs Service radar operator picked up a Cessna aircraft in the vicinity of Port-au-Prince, Haiti, traveling north. The aircraft was apparently coming from Colombia. Customs pilots intercepted the aircraft, followed it for approximately four hours, and observed it maneuvering erratically. A Customs pilot watched as a passenger jettisoned documents and dark colored packages from the aircraft shortly after it crossed the coastline near Wilmington, North Carolina. Immediately before the passenger dropped the packages, the aircraft flew over a dirt airstrip. Pet. App. 2a-3a.

The Customs pilot recorded the aircraft's tail number, observed petitioner's co-defendant John Carlos Massuet in its pilot's seat, and directed the plane to land. Massuet landed at the New Hanover County, North Carolina Airport where he and petitioner, who was the sole passenger, were taken into custody. Upon receiving the coordinates of the location where the aircraft's passenger had been observed jettisoning packages, the Coast Guard calculated the probable drift of the items and undertook a search of

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[1] Petitioner was acquitted on a count alleging failure to comply with aviation reporting requirements while piloting an aircraft containing narcotics. His co-defendant John Carlos Massuet, was convicted on the aircraft notification count, the aviation smuggling count, the possession count, and the attempted importation count.

the area. The Coast Guard subsequently recovered 49 brown colored packages floating in the water, each of which contained a kilogram of 94% pure cocaine. In addition, a drug-detecting dog indicated that the Cessna aircraft had a residual odor of illegal drugs. The plane contained an aerial map with marked coordinates corresponding to the dirt airstrip over which it had flown immediately before the packages were dropped. Pet. App. 3a.

Petitioner was convicted on several counts, including Count 4, which alleged that while he was on board an aircraft registered in the United States, petitioner knowingly and intentionally possessed cocaine with intent to distribute it, in violation of 21 U.S.C. 959(b)(2). At sentencing, the district court rejected petitioner's contention that he could not be sentenced for that offense because Congress had neglected to prescribe a corresponding penalty.[2] Pet. App. 14a-15a, 17a-19a.

2. The court of appeals affirmed petitioner's conviction but remanded for resentencing (Pet. App. 1a-11a).

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[2] The court of appeals found that there was no penalty provision applicable to violations of Section 959(b)(2). As originally enacted in 1970, Section 1009 of the Controlled Substances Import and Export Act prohibited the unlawful manufacture or distribution of a controlled substance with knowledge that it would be imported into the United States (see Pub. L. No. 91-513, Tit. III, 84 Stat. 1289 (codified at 21 U.S.C. 959)). Section 1010(b)(1) of the Act authorized a sentence of up to 15 years' imprisonment and a $25,000 fine for the offenses of manufacturing or distributing a controlled substance contrary to Section 959 (see 21 U.S.C. 960(b)(1)). In the Drug Abuse Act of 1986, Congress amended Section 1009 of the Controlled Substances Import and Export Act by adding a new subsection (b). See Pub. L. No. 99-570, Tit. III, § 3161(b) 100 Stat. 3207-94 (codified at 21 U.S.C. (Supp. IV) 959(b)). But in enacting the new legislation, Congress failed to amend the penalty provision of Section 960(b). Section 960 did not include a specific penalty provision for the Section 959(b)(2) offense that was added in 1986 – possession of a controlled substance on board a United States aircraft with intent to distribute it.

The court rejected petitioner's claim that he was improperly sentenced on the possession count (Pet. App. 7a-11a). The court held that although petitioner could not be sentenced for a violation of Section 959(b)(2), he could properly be sentenced for a violation of 21 U.S.C. 841(a)(1). The court explained that the elements of Section 841(a)(1) are virtually identical to those of Section 959(b)(2), and the indictment and jury charge both supported a conviction under Section 841(a)(1) as well as Section 959(b)(2). The court accordingly remanded the case to the district court with instructions to resentence petitioner pursuant to 21 U.S.C. 841(b) for a violation of Section 841(a)(1). Pet. App. 8a-9a, 11a.

ARGUMENT

Petitioner does not dispute the court of appeals' ruling "that the indictment fairly and unprejudicially charged Petitioner with a violation of 21 U.S.C. 841(a)(1) even though Section 841(a)(1) was not cited therein" (Pet. 7). Petitioner's sole contention is that "the crime for which the court of appeals has held Petitioner can be sentenced was never adequately defined for the jury" because among the elements of Section 841(a)(1) is the element of "knowingly or intentionally," which "is not an element of Section 959(b)(2) and was not charged to the jury which convicted Petitioner" (Pet. 7-8).

Contrary to petitioner's claim, however, both the indictment and the jury instructions made clear that petitioner's possession of the controlled substance had to be knowing and intentional. The indictment and instructions were therefore sufficient to support petitioner's conviction and sentencing under Section 841(a)(1).

The indictment in this case alleged that petitioner "did unlawfully, knowingly, and intentionally possess with in-

tent to distribute" 49 kilograms of cocaine. Those allegations satisfied all the elements of a violation of Section 841(a)(1). It is clear, therefore, that the grand jury found everything necessary to support a conviction on that charge.

It is equally clear that the petit jury likewise had to have found every element necessary to support a conviction under Section 841(a)(1). At the beginning of the instructions concerning the possession count, the district court informed the jury that the count "charges that on or about 1 June 1987, [petitioner], being on board an aircraft registered in the United States, did unlawfully, knowingly and intentionally possess with intent to distribute a Schedule II narcotic controlled substance * * * " (Pet. App. 21a). And, in defining the term "possession," the court specifically instructed the jury that "[p]ossession here is the exercise of dominion and control over the property with knowledge of its nature" (Pet. App. 22a).[3] Hence, in finding petitioner guilty of violating Section 959(b), the jury must have concluded that petitioner had knowledge of the nature of the narcotics in his possession, as is required for conviction under Section 841(a)(1).

For this reason there is no merit to petitioner's contention (Pet. 8-11), that the decision of the court of appeals conflicts with decisions of other courts of appeals. As shown by the very cases upon which petitioner relies, the

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[3] At one point in the jury charge, the court instructed that the government "is not required to show that the defendants knew that the substance was cocaine" (Pet. App. 21a). That charge did not suggest that petitioner did not have to know anything about the substance he possessed. It was simply the standard instruction, applicable either to Section 841(a)(1) or to Section 959(b)(2), that it is enough to constitute knowledge that the defendant knew that the substance he possessed was some kind of controlled substance. See Devitt & Blackmar, *Federal Jury Practice and Instructions* § 58.14A (Supp. 1988).

"knowing possession" element of Section 841(a)(1) " 'refers to the possessor's awareness that he is in possession of a controlled substance' " (Pet. 9, quoting *United States* v. *Pope*, 561 F.2d 663, 670 (6th Cir. 1977)). The jury instructions in this case included just such an element. See Pet. App. 22a ("Possession here is the exercise of dominion and control over the property with knowledge of its nature.").[4] Because the indictment and jury instructions required the grand and petit juries to find every element of a violation of Section 841(a)(1), it was proper for the court of appeals to permit the district court to sentence petitioner under that statute. As the court of appeals noted (Pet. App. 10a), this case is therefore indistinguishable from cases in which there is an error in the statutory provision cited in the indictment, a defect that the Federal Rules of Criminal Procedure specifically provide does not justify dismissal or renewal in the absence of prejudice. See Fed. R. Crim. P. 7(c)(3).

Even if there were some defect in the jury instructions in this case, further review would not be warranted because any such deficiency would be harmless in light of the over-

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[4] Neither *United States* v. *James*, 555 F.2d 992, 999 (D.C. Cir. 1977), nor *United States* v. *Clark*, 475 F.2d 240, 248 (2d Cir. 1973), upon which petitioner also relies (Pet. 9), suggests that any further instructions would have been necessary regarding the "knowingly or intentionally" element of Section 841(a)(1). *James* did not involve the sufficiency of jury instructions at all. The reference in that case to the essential elements of Section 841(a)(1) occurs only in the context of the court's deciding whether the relevance of proffered testimony outweighed its possible prejudicial effect on the jury (see 555 F.2d at 998-1000). *Clark* is also unhelpful to petitioner. The court in *Clark* held that the jury instructions regarding Section 841(a)(1) were invalid because "the key terms remained undefined" (475 F.2d at 249). The court did not elaborate upon what instructions would be sufficient. As described in the text above, however, the jury instructions in this case, unlike in *Clark*, did explain the knowledge element of the offense.

whelming evidence of petitioner's knowledge and intent. See *Rose* v. *Clark*, 478 U.S. 570, 581-582 (1986). The drug-detecting dog's alert in the tail section of the aircraft established that the plane had recently contained illegal drugs. The aircraft's point of origin, the direction of its travel, its erratic flight path, and its special equipment likewise supported the inference that its occupants were involved in drug smuggling. Most importantly, after the aircraft had been intercepted, a Customs officer observed petitioner jettisoning blocks of the cocaine into the ocean, apparently to avoid detection when the aircraft landed. See Pet. App. 2a-3a.[5]

Further review is also not warranted because Congress has recently corrected the statutory omission that created the controversy in this case. Section 6475 of the Anti-Drug Abuse Act of 1988 amends 21 U.S.C. 960(a)(3) to prescribe a penalty for violation of Section 959(b)(2). See Pub. L. No. 100-690, § 6475 (Nov. 18, 1988). Hence, this case presents no legal issue of continuing significance.

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[5] Although the Customs officer did not specifically identify petitioner as the person who dumped the packages into the ocean, he identified Massuet as the pilot, and petitioner was the only passenger in the aircraft (see Pet. App. 2a-3a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
JOHN F. DE PUE
Attorney

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